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7 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**  
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9 UNITED STATES OF AMERICA,  
10  
Plaintiff,  
11  
vs.  
12 EVE E. MAZZARELLA,  
13  
Defendant.

Case No. 2:08-CR-64-JCM

**Government's Motion for an Order  
Deeming the Attorney-Client Privilege  
Waived and for a Revised Briefing  
Schedule**

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15  
16 **I. Introduction**

17 In a motion to vacate her convictions and sentence, Defendant Eve Mazzarella  
18 alleges that attorneys Douglas Mitchell and E. Robert Wallach provided constitutionally  
19 ineffective assistance. This Court ordered the government to respond to Mazzarella's  
20 motion, but to address that specific allegation, the government needs information from  
21 Mitchell and Wallach. The government accordingly seeks an order allowing it to obtain that  
22 information.

23 Defendant Eve Mazzarella filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set  
24 aside, or correct sentence by a person in federal custody. ECF No. 700. In her motion—and

1 in the 177-page memorandum of law that accompanied her motion, *see* ECF No. 207—  
2 Mazzearella accuses her trial attorneys of providing constitutionally ineffective assistance  
3 based. *See* ECF No. 700, at 7–16; ECF No. 701, at 76–145. Her motion and memorandum  
4 include numerous accusations of deficient performance, including (among many others) 1)  
5 that Wallach “steered this case in the disastrous direction of a trial in order to cash in on  
6 [the] \$250,000 trial fee,” ECF No. 701, at 76; 2) that her attorneys grossly misrepresented  
7 the possible consequences of convictions, *id.* at 77; 3) that her attorneys did not explain the  
8 sentencing guidelines to her, *id.* at 79; 4) that they failed to effectively cross-examine the  
9 government’s witnesses, *id.* at 82; 5) that they failed to introduce evidence that, Mazzearella  
10 claims, would have created reasonable doubt, *id.* at 93; 6) that they “failed to rebut false  
11 testimony,” *id.* at 97; 7) that they failed to introduce evidence to support an advise-of-  
12 counsel instruction, *id.* at 125; and 8) that they failed to request use immunity for a certain  
13 witness, *id.* at 132; and 9) that they failed to call Mazzearella to testify. *Id.* at 133.

14 On October 24, 2018, this Court issued an order directing the government to  
15 response to Mazzearella’s motion within 21 days, *i.e.*, by November 14, 2018. ECF No. 706.

## 16 II. Points and Authorities

17 “It has long been the rule in the federal courts that, where a habeas petitioner raises a  
18 claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all  
19 communications with his allegedly ineffective lawyer.” *See Bittaker v. Woodford*, 331 F.3d  
20 715, 716 (9th Cir. 2003) (citing *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997)).  
21 “Where a party raises a claim which in fairness requires disclosure of the protected  
22 communication, the privilege may be implicitly waived.” *United States v. Ortland*, 109 F.3d  
23 539, 543 (9th Cir.), *cert. denied*, 522 U.S. 851 (1997) (citations omitted). Mazzearella’s  
24 motion and memorandum include numerous accounts of conversations she allegedly had

1 with her attorneys and advice they alleged provided, or failed to provide to her. To response  
2 to Mazzarella's accusations, the government needs to hear Mitchell's and Wallach's side of  
3 the story.

4 "A reasonable tactical choice based on an adequate inquiry is immune from attack  
5 under *Strickland*." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997); *see also United*  
6 *States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1996) (Defense counsel's actions are  
7 not considered deficient when made for tactical and strategic reasons that were not "outside  
8 the wide range of professionally competent assistance"). Mazzarella's motion and  
9 memorandum include numerous complaints about actions her attorneys took, or did not  
10 take, at trial. To response to those accusations, the government needs to hear Mitchell's and  
11 Wallach's explanations for why they did or did not take those actions, and whether their  
12 decision were reasonable tactical or strategic choices.

### 13 **III. Conclusion**

14 WHEREFORE, based on the foregoing, the government respectfully requests that  
15 the attorney-client privilege in 2:08-CR-64-JCM be deemed waived as to the above-  
16 referenced matters, which Mazzarella put at issue in her motion to vacate, set aside, or  
17 correct sentence. The government respectfully request that this Court order Mr. Mitchell  
18 and Mr. Wallach to provide the government, within 60 days after the date of the Court's  
19 order, affidavits or declarations, as well as any relevant materials and information,  
20 addressing whether the allegations in Mazzarella's motion and memorandum.<sup>1</sup> The  
21 government further requests that it be granted an additional 60 days, after receiving Mr.

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22 <sup>1</sup> The government usually asks for an order directing counsel to provide an affidavit or  
23 declaration within 30 days, but requests 60 days here in light of the large number of, and  
24 level of detail in, the accusations Mazzarella raises against her attorneys, and the  
expectation that it will take time for her prior attorneys to compile information and draft  
comprehensive responses to those accusations.

1 Mitchell's and Mr. Wallach's affidavits or declarations, to file its response to Mazzalrella's  
2 2255 motion.

3 Dated this 5th day of November, 2018

4 DAYLE ELIESON  
United States Attorney

5  
6 s/Elizabeth O. White  
ELIZABETH O. WHITE  
7 Appellate Chief and  
8 Assistant United States Attorney  
9  
10

11 **CERTIFICATE OF SERVICE**

12 I certify that on November 5, 2018, I electronically filed the foregoing Government's  
13 Motion with the Clerk of the Court by using the CM/ECF system.

14 In addition, I sent a curtesy copy of the foregoing motion via email to Douglass A.  
15 Mitchell, Esq., at [dmitchell@bsflp.com](mailto:dmitchell@bsflp.com); and sent a curtesy copy of the foregoing motion to  
Robert Wallach via U.S. mail at the following address:

16 E. Robert (Bob) Wallach, Esq.  
Attorney at Law  
17 155 Jackson Street, Suite 602  
18 San Francisco, CA 94111  
19

20 Dated: November 5, 2017

21 s/ Elizabeth O. White  
ELIZABETH O. WHITE  
22 Appellate Chief and  
23 Assistant United States Attorney  
24

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

-oOo-

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 vs.

6 EVE E. MAZZARELLA,

7 Defendant.

Case No. 2:08-CR-64-JCM

**Order**

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10 Based upon the pending motion of the government, and good cause appearing,

11 **IT IS HEREBY ORDERED** that the attorney-client privilege in 2:08-CR-64-JCM  
12 between the Defendant, Eve Mazzarella; and attorneys Douglas Mitchell, Esq. and Robert  
13 Wallach, Esq., shall be deemed waived for purposes relating to Mazzarella's motion under  
14 28 U.S.C. § 2255 to vacate, set aside or correct her sentence. Mr. Mitchell and Mr. Wallach  
15 shall, within 60 days of this order, each provide the government with an affidavit or  
16 declaration addressing the allegations of ineffective assistance of counsel raised in  
17 Mazzarella's motion. Further, Mr. Mitchell and Mr. Wallach may communicate with  
18 government counsel and provide supporting documentation regarding all matters put at  
19 issue in Mazzarella's motion.

20 The government shall have an additional 60 days, after receiving Mr. Mitchell and  
21 Mr. Wallach's affidavits or declarations, to file its response to Mazzarella's 2255 motion.

22 DATED this 2nd day of April, 2019

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UNITED STATES DISTRICT JUDGE